

HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,) No. CR18-090-JCC
)
Plaintiff,)
)
v.) DEFENDANT'S RESTITUTION
) MEMORANDUM
THOMAS MAHONEY,)
) [FILED UNDER SEAL—related to
Defendant.) Doc. No. 44]
)

Thomas Mahoney, through counsel, submits this restitution memorandum in support of \$3,285 in restitution. Specifically, the defense agrees that the following costs are covered under the Mandatory Victims Restitution Act, 18 U.S.C. §3663A and §3664 (“the MVRA”):

- | | |
|----------------------------|------------|
| 1) Nancy Joyce counseling: | \$2,210.00 |
| 2) East Bay Behavioral: | \$400.00 |
| 3) Diablo Behavioral: | \$675.00 |

I. BACKGROUND

Thomas Mahoney was convicted of the following crimes: 1) Three counts of Travel with Intent to Engage in a Sexual Act with a Minor in violation of 18 U.S.C. §2434(b); and 2) one count of Enticement of a Minor in violation of 18 U.S.C. §2422(b). On January 8th, 2019, this court sentenced Mr. Mahoney to 120 months of imprisonment with restitution to be determined later. Doc. No. 40.

1 A. *The offense conduct*

2 The offense conduct summarized in the pre-sentence, consistent with Mr.
3 Mahoney's plea agreement, set forth the following material facts for sentencing:

- 4 ■ Mr. Mahoney met MV (minor victim) via Facebook. When MV was 14
5 years old, through age 15, both MV and Mr. Mahoney engaged in sexual
6 intercourse together. Additionally, the two exchanged approximately 99 files
7 through Facebook involving sexually explicit communications.
- 8 ■ The sexually explicit computer files contained nude and partially nude
9 images of MV, images of MV masturbating, and images of MV and Mr.
10 Mahoney engaged in sexual intercourse. Some of these files were created by
11 Mr. Mahoney using his cell phone camera.
- 12 ■ According to MV's interview with law enforcement, she had spent three days
13 at Mr. Mahoney's residence in Washington state where Mr. Mahoney
14 supplied her with alcohol. The two also had sexual intercourse during this
15 time.
- 16 ■ From ages 14 through 15, MV moved to California. However, both MV and
17 Mr. Mahoney continued to communicate. On three occasions, Mr. Mahoney
18 traveled to California to meet MV where the two engaged in sexual
19 intercourse. According to MV's interview with law enforcement, Mr.
20 Mahoney offered her marijuana and then had sexual intercourse. MV stated
21 that Mr. Mahoney also produced a video of the sexual intercourse.
- 22 ■ Sometime in October of 2016, MV accompanied her mother on a trip to the
23 Seattle area. During this trip, MV met up with Mr. Mahoney and they again
24 had sexual intercourse. She told law enforcement that Mr. Mahoney was
25 mean to her, and did not act as though he cared for her. She also learned that
26

1 she was pregnant. The pregnancy was terminated using the services of a free
2 clinic.

3 ■ On October 30, 2017, law enforcement received a cyber-tip about the
4 Facebook communications. And on October 31, 2017, Mr. Mahoney was
5 arrested and has been in custody ever since.

6 According to Probation's presentence report, within the "Victim Impact Section"
7 of the report, it notes that "child victims, like the victim in this case, are not only
8 sexually abused, but they are often emotionally and physically abused in order to coerce
9 or force their participation in the production of these images and videos."

10 At Mr. Mahoney's sentencing, MV spoke about the emotional impact of the
11 crime, including her counseling sessions to help deal with anxiety, depression, bi-polar
12 disorder, and obsessive compulsive disorder. MV's mother also spoke about the costs
13 associated with the crime and the impact on MV. In addition, the mother supplied
14 records for the court to consider for purposes of supporting her restitution claim of
15 \$72,503.39. Doc. 44 (filed under seal). We respectfully dispute the claimed amount
16 and instead assert that the correct restitution amount is \$3,285.

17 II. ACCOUNTING OF THE RESTITUTION FIGURE

18 A. *Legal Authority*

19 The government bears the burden of proving restitution by a preponderance of
20 the evidence. *United States v. Thompson*, 830 F.3d 1049, 1067 (9th Cir. 2016).
21 Specifically, the government must prove the amount of loss and proximate causation
22 from the defendant's criminal conduct. *United States v. Eyraud*, 809 F.3d 462, 467 (9th
23 Cir. 2015); *United States v. Kennedy*, 643 F.3d 1251, 1261 (9th Cir. 2011) (restitution
24 "awarded only for losses for which the defendant's conduct was an actual and
25 proximate cause."). "But for" causation is insufficient. *Kennedy*, at 1261. Moreover,
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any intervening cause must be “directly related to the defendant’s conduct.” *United States v. Swor*, 728 F.3d 971, 974 (9th Cir. 2013).

In *Swor*, the defendant challenged part of a \$747,345 restitution order arguing that the district court erred in applying a “but for” causation test for restitution. In other words, the district court ordered the defendant to pay full restitution for all losses on the grounds that “but for” the defendant’s conduct, the total losses exceeding \$700,000 would never have happened. The defendant argued that if the court instead applied an actual causation test, the restitution amount would have been reduced by \$166,887.09—thereby distinguishing the economic loss (resulting from the overall crime) from the restitution owed to victims for losses directly related to the defendant’s offense conduct. *Id.* at 973-974. The Ninth Circuit determined it was an abuse of discretion to apply the “but for” causation test rather than the actual causation test for determining the defendant’s restitution responsibility. *Id.* at 974-975.

B. MV’s accounting (Doc. No. 44)

The factual details and explanation supporting MV’s accounting is set forth in the letter dated January 16, 2019, prepared by MV’s mother. Doc. No. 44. The mother’s letter is divided into 5 sections: 1) Bills from 11/25/2017; 2) Bills from 1/17/2018; 3) Bills from 3/13/2018; 4) Counseling; and 5) Additional bills not included.

The bills associated with 11/25/2017, 1/17/2018, 3/13/2018 fail to establish a sufficient nexus between Mr. Mahoney’s crime and the harm caused to MV. In other words, Mr. Mahoney’s crime was not the direct and proximate cause of the accounted costs relating to these three dates. Accordingly, the supportive explanation for these three events comports more with a “but for” argument, rather than an actual causation analysis, and therefore does not determine the true restitution costs.

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1 1) Bills associated with 11/25/2017

2 The costs associated with this section relate to an apparent suicide attempt and
3 the expenses connected with MV's hospitalization. The letter indicates that MV's
4 mother knew that MV was a suicide risk and contacted law enforcement after learning
5 that MV left the house with a bottle of benzodiazapienes that had been prescribed for
6 MV. Law enforcement found MV 30 miles from home passed out from an overdose of
7 benzodiazapienes in San Francisco. An ambulance then took MV to Zuckerberg SF
8 General Hospital. MV's mother states that the bills associated with this hospitalization
9 exceed \$19,000.

10 The defense respectfully submits that the government has failed to establish by a
11 preponderance of the evidence that Mr. Mahoney's crime was the direct and proximate
12 cause of this apparent suicide attempt. There have been no statements presented by MV
13 or adopted by MV indicated that she attempted suicide because of Mr. Mahoney's
14 crimes. Instead, MV's mother opines that Mr. Mahoney's crimes drove MV to attempt
15 suicide—and that is insufficient to support a restitution award for the hospitalization
16 costs.

17 2) Bills from 1/17/2018

18 The victim's mother attributes approximately \$2,069.13 in costs stemming from
19 MV breaking some of the windows in the family's home. According to MV's mother,
20 MV did this in order to go to jail to make sure that jail was a bad enough place for Mr.
21 Mahoney. Later, law enforcement tried to set up a jail tour for MV but that did not
22 work out. MV's mother states that this event was deemed a PTSD-related outburst "by
23 her therapist and emergency providers." The costs for the ambulance service and the
24 psychiatric hold amounted to \$2,069.13.

25 The correct way to sufficiently prove, by a preponderance of the evidence, that
26 this episode was a "PTSD-related outburst" would be to provide a declaration or other

1 report from the “therapist and emergency providers” that MV’s outburst was caused by
 2 PTSD associated with Mr. Mahoney’s crime. Alternatively, a declaration from MV
 3 stating that the outburst occurred because of PTSD originating from Mr. Mahoney’s
 4 crime might suffice. However, we have neither for our record and therefore this
 5 \$2,069.13 claimed amount should not be added to the restitution figure.

6 3) Bills from 03/13/2018

7 MV’s mother claims that following a March 12, 2018, therapy session, MV went
 8 into another PTSD rage where MV assaulted her mother. According to the mother’s
 9 letter, “providers described this event similar to the violent episodes soldiers suffering
 10 from PTSD sometime experience, targeting family members when triggered about
 11 trauma.” However, there is no support from the “providers” that PTSD associated with
 12 Mr. Mahoney’s crimes caused MV to assault her mother, followed by inpatient
 13 hospitalization. Nor do we have any direct statements from MV supporting this
 14 conclusion that Mr. Mahoney’s crimes caused her to assault her mother. As such, these
 15 costs should be excluded from the restitution amount.

16 4) Additional bills not included

17 Additional bills not included, as summarized in the January 16, 2019, letter,
 18 should be excluded from the restitution amount. The government bears the burden of
 19 proof and must establish a proper foundation for records and other documents in order
 20 to support a claimed restitution figure. Failure to do so will not satisfy the
 21 government’s burden of proof.

22 Finally, MV’s mother is claiming that Mr. Mahoney borrowed \$5000 from MV
 23 and has yet to pay that amount back. Regardless of whether Mr. Mahoney paid the
 24 money back, this \$5000 figure is not related to any material element of Mr. Mahoney’s
 25 crime and therefore cannot be included in the restitution figure. See *Paroline v. United*
 26

1 *States*, 134 S. Ct. 1710 (2014) (The harm must have been “directly and proximately”
2 caused by an element of the offense of conviction).

3 *C. The Defendant’s accounting.*

4 Certainly, MV’s counseling and therapy related to the defendant’s crime must be
5 included in the restitution figure as required by law. To date, MV’s mother has
6 submitted records for PTSD counseling starting on January 8, 2018, through July 2,
7 2018 (Nancy Joyce counseling), totaling \$2,210. Additionally, MV’s mother produced
8 a bill for an evaluation at East Bay Behavioral Center on October 31, 2018, in the
9 amount of \$400. Finally, MV’s mother submitted billings for two additional therapy
10 sessions on December 17, 2018, and December 26, 2018 in the amounts of \$225 and
11 \$450 respectively. Thus, the total amount for counseling and therapy costs thus far
12 amounts to \$3,285.

13 One objection we have with the restitution claim is that it seeks \$30,600 for
14 “ongoing” therapy assuming “45 therapy sessions/yr for 4 yrs at average \$170/session.”
15 In other words, it appears that the \$72,503.39 restitution figure seeks restitution for
16 services that have not happened and therefore do not exist.

17 The MVRA requires that the party claiming restitution must have suffered one of
18 the harms specified in 18 U.S.C. §3663A(b). Relevant to MV’s case, that harm would
19 be the following:

20 (2) in the case of an offense resulting in bodily injury to a
21 victim—(A) pay an amount equal to the cost of necessary
22 medical and related professional services and devices relating
23 to physical, psychiatric, and psychological care, including
24 nonmedical care and treatment rendered in accordance with a
25 method of healing recognized by the law of the place of
26 treatment.

This law is similar to 18 U.S.C. §2259 mandating restitution for victims of sexual
exploitation of children—““full amount of the victim’s losses’ includes any costs

1 incurred by the victim for . . . medical services relating to physical, psychiatric, or
 2 psychological care.” *Id.* at §2259(b)(3)(A).

3 The remedy for seeking losses not yet ascertainable is set forth under 18 U.S.C.
 4 §3664(d)(5), giving the victim the right to petition the court for revision of the
 5 restitution order. To award restitution for services that have not occurred, and may
 6 never occur, is the functional equivalent of awarding costs for pain and suffering—
 7 which is prohibited. Specifically, the principal limitation on the type of harm that can
 8 be the basis for restitution is that a court may not award restitution for mental anguish,
 9 pain and suffering. *United States v. Hicks*, 997 F.2d 594 (9th Cir. 1993). At this point,
 10 hypothetical future counseling sessions are not ascertainable and therefore cannot factor
 11 into the restitution figure.

12 Accordingly, the total restitution accounting is as follows:

- 13 1) Nancy Joyce Counseling: \$2,210
 14 2) East Bay Behavioral: \$400
 15 3) Diablo Behavioral: \$675

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 17 TOTAL: \$3,285.

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 19 DATED this 27th day of February, 2019.

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 21 Respectfully submitted,

22 *s/ Jesse Cantor*
 23 Assistant Federal Public Defender
 24 Attorney for Thomas Mahoney
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CERTIFICATE OF SERVICE

I certify that on February 27, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

s/ Alma R Coria
Senior Legal Assistant
Office of the Federal Public Defender